

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

RUBEN CARNERO

Plaintiff,

- v. -

BOSTON SCIENTIFIC CORPORATION

Defendant.

Civil Action No. 04-cv-10031-RWZ

**DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR
SUMMARY JUDGMENT OR STAY AND LOCAL RULE 56.1 STATEMENT OF
UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION AND REQUEST
FOR ORAL ARGUMENT**

Defendant Boston Scientific Corporation ("BSC") hereby moves to dismiss or, in the alternative, for summary judgment or to stay Plaintiff Ruben Carnero's ("Carnero") complaint. In support of its motion, it has filed herewith a Memorandum in Support of its Motion to Dismiss or, in the alternative, Motion for Summary Judgment or Stay.

Pursuant to Local Rule 56.1, BSC submits a Statement of Undisputed Material Facts in support of its Motion for Summary Judgment. Pursuant to Local Rule 56.1, the following documentation is submitted in support of the Motion: (1) the Affidavit of Juan Pedro Ziemke; (2) the Affidavit of Carlos Dodds; (3) the Supplemental Affidavit of Carlos Dodds; and (4) the Affidavit of Leslie Blickenstaff, Esq. and the pleadings and exhibits attached thereto, including the Affidavit of Ruben Carnero.

Parties

1. Defendant Boston Scientific Corporation ("BSC") is a Delaware corporation with its principal place of business in Natick, Massachusetts. BSC is a party in three related actions:
 - (a) the present case; (b) a related action that was filed with this Court on August 8, 2003 (the

“Massachusetts Action”); and (3) a related action in Argentina filed in the spring of 2003 (the “Argentinean Action”).

2. Boston Scientific Argentina S.A. (“BSA”) is a subsidiary of BSC. It is an Argentinean corporation with its principal place of business in Buenos Aires, Argentina. BSA is a party in the Argentinean Action.

3. Plaintiff Ruben Carnero is a citizen of Argentina and is listed on Argentina’s national registry as being domiciled in Buenos Aires. Carnero is a party in this case, the Massachusetts Action and the Argentinean Action.

Carnero’s Employment With BSA

4. On January 31, 1997, BSA tendered Carnero a written offer of a position of employment in Argentina (the “BSA Offer Letter”). Ziemke Aff. ¶ 3, Ex. A. The BSA Offer Letter provides that Carnero’s vacations, holidays and benefits would be provided pursuant to Argentine law.

5. Shortly thereafter, Carnero entered into an employment agreement with BSA (the “BSA Agreement”). Ziemke Aff. ¶ 4, Ex. B. The BSA Agreement supercedes all former agreements between Carnero and BSA. The BSA Agreement provides that BSA may terminate Carnero’s employment “according to and under the circumstances set forth by Argentine labor regulations.” The BSA Agreement was entered into in Argentina and provides that it will be governed by Argentine law.

6. Between February 1, 1997 and late 2000, Carnero rendered services for BSA pursuant to the BSA Agreement. Initially, Carnero was employed as the Country Manager for Argentina. In 1999, Carnero was assigned to the position of Latin America Business

[his] current assignment as BSC's Country Manager for Brazil but from any position for BSC in Camero asserts that "it was clear to [him] that BSC intended to terminate [him] not only from Camero's Opposition to BSC's Motion to Dismiss or Stay in the Massachusetts Action, p.12). Part of the BSC organization." See Affidavit of Leslie Blickeenstaff ("Blickeenstaff Aff."), ¶5. A termination from all three entities, meaning that Camero would "no longer be working for any 10. Camero has admitted that he understood that his August 8, 2002 termination was

9. On August 8, 2002, BSB terminated Camero's assignment in Brazil.

the terms of the BSB Assignment Memorandum. Ziemke Aff. ¶9.

Thereafter, from around July 2001 to August 8, 2002, Camero performed services for BSB under during the period that he was assigned to perform services for BSB. Ziemke Aff. ¶9. was then suspended, but not terminated, so that he could continue to be an employee of BSA be interpreted according to the laws of Brazil. Camero's employment relationship with BSA "Trabalho", Ziemke Aff. ¶8, Ex. E. This agreement, written in Portuguese, provides that it will On June 26, 2001, Camero signed an agreement with BSB entitled "Contrato de Assignment Memorandum" to supersede the BSA Agreement. Ziemke Aff. ¶9.

Memorandum". Ziemke Aff. ¶7, Ex. D. Neither the BSB Offer Letter nor the BSB specific terms and conditions that would govern the Brazilian assignment (the "BSB Assignment Memorandum"). Ziemke Aff. ¶6, Ex. C. That same day he received a document setting forth the Offer Letter". Ziemke Aff. ¶6, Ex. C. In late 2000, an assignment as country manager in Boston Scientific's Brazilian Camero received a letter that offered him an assignment as Country Manager for BSB (the "BSB operations at Boston Scientific Do Brasil Ltda. ("BSB") became available. On June 25, 2001,

7. In late 2000, an assignment as country manager in Boston Scientific's Brazilian and his principal office continued to be in Buenos Aires. Ziemke Aff. ¶5.

Development Director. In that position, he continued to be employed and compensated by BSA

English by an Argentinean attorney.
For the convenience of the Court, all of the telegrams referenced herein have been translated from Spanish to

Ziemke Aff. ¶ 12(a), Ex. F.

Having failed to respond to my claims I hereby request you
to pay within a 48 hours term, severance indemnities
according to Argentine Labor Law and emergency
legislation according to my position and salary. Otherwise I
will consider myself terminated without just cause.

(a) On March 19, 2003, Camero sent a telegram to BSA stating:

regarding his employment at BSA;

12. After the negotiations failed, Camero and BSA exchanged various telegrams

March 2003, did not result in an agreement. Ziemke Aff. ¶ 11.

thus attempted to negotiate for them. These negotiations, which lasted from August 2002 to
Camero believed that he should receive additional sums of money from other BSC entities and
pursuant to Brazilian labor laws and the "Contrato de Trabajo". Ziemke Aff. ¶ 10. However,
11. Upon terminating Camero's assignment, BSB paid Camero the sums it owed him
indemnities. *Id.*

After August 8, 2002, constituted maneuvering to avoid the obligation to pay statutory severance
Brazilian and Argentine Law). Finally, Camero has asserted that all of BSA and BSC's actions

settlement negotiations with BSC regarding his rights to statutory termination benefits under
BSA and BSB. *Id.* (explaining that between August 2002 and March 2003 he engaged in
he had been terminated from BSB, BSA and BSC because he sought severance indemnities from

that my "future pursuits" would no longer be within the BSC organization."). Camero believed
job capacity for BSC . . ."); *Id.* (asserting that the August 9, 2002 memorandum "clearly states
any other capacity." *Id.* ("Mr. McFaul made it clear that BSC intended to terminate me from any

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Dear Mr. Camero, We hereby acknowledge receipt (on 3/26/03) of your international telegram dated 3/25/03 whereby you consider yourself dismissed. We hereby repeat our telegram dated 3/25/03 whereby we resume as of 4/2/03 the employment relationship which was suspended

(e) BSA responded as follows:

without just cause". Ziemke Aff. ¶ 12(d), Ex. H.
BSA), sent BSA another telegram, stating, "Due to your silence I consider myself terminated
(d) On March 26, 2003, Camero (who had not waited for a response from
to the post office from which it was delivered.
Because Camero's original telegram did not identify Camero's domicile, BSA sent this telegram
Ziemke Aff. ¶ 12(c), Ex. G.

decided to suspend the labor relationship.
income as the one you have received through the date you
\$15,000 (Fifteen Thousand Argentine Pesos), identical
similar hierarchy and preserving your monthly salary of
country, the company shall provide you with a position of
eliminated due to the economic crisis suffered by the
Director that you held through June 2001 has been
4/1/03. Since the position of Business Development
(unpaid leave), this Company shall re-incorporate you on
your own decision, collecting no payment whatsoever
restore the employment relationship that was suspended by
this regard, we inform you that considering your will to
3/21/03) of your international telegram dated on 3/19/03. In
Dear Mr. Camero, We hereby acknowledge receipt (on
3/21/03) of your international telegram dated on 3/19/03. In

follows:
(c) On March 25, 2003, BSA responded to Camero's March 21st telegram as

precise domicile for Camero.
assignment to work at BSA. The telegram was sent from Foz do Iguaçu, Brazil and did not state a
first notice BSA had received from Camero regarding his desire to return from his BSB
(b) BSA received this telegram on March 21, 2003. This telegram was the

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(g) On April 5, 2003, Mr. Camero responded:

Ziemke Aff. ¶ 12(j), Ex. J.

Mr. Camero: April 2, 2003 has passed and you have not reinstated the employment relationship with this Company, which was suspended by your own request. Evidence, you have never had the intention of reinstating the employment relationship with this Company. This is not only proved by the content of your letters, in which you always made clear your will of termination, but also by the fact that you sent your letters from Brazil and not from Buenos Aires, where you could be accessible to the Company. Likewise, you never let the Company know your domicile in Brazil so as to be able to contact you. Your domicile in Brazil so as obstructions are evidenced by the telegrams you sent from Brazil, without stating any domicile whatsoever.

Obviously, your malicious conduct made it impossible for us to maintain an exchange of letters with you. It is worth noticing that your connection has also been demonstrated by the fact that your letters were sent from different places within Brazil (explicitly from São Paulo and Floraopolis).

Therefore, we hereby assert the termination of the employment relationship by your own fault and responsibility.

another telegram, which read as follows:

(1) Because Camero did not respond to BSA, on April 3, 2003 it sent him

respond.

BSA thereby gave Camero the opportunity to retract his resignation. However, Camero did not

Liemke Aff. ¶ 12(e), Ex. I.

By your own decision, preserving a similar job position to the one you held early before the suspension and receiving a monthly salary of \$15,000 (Fifteen Thousand and Argentine Pesos), identical salary you used to receive at the time you decided to suspend the labor relationship. We terminantly reject your alleged silence on our part. We demand you modify your breaching position. In any event, in case you turn down our offer we shall consider that the relationship has been terminated by your exclusive fault.

base salary pay, overtime compensation, accrued thirteenth salary, accrued vacations, damages, sought "outstanding salaries, seniority, payment in lieu of prior termination notice, whole month lawsuit deriving from a labor relationship. Dodds Aff., ¶5. In his request for mediation, Camero Argentinian court. This mediation process must be filed and completed prior to filing any request for mediation and complete the mediation process before filing a lawsuit with an BSA. With only a few exceptions, Argentinian law requires a plaintiff in a labor dispute to file a 13. In early April 2003, Camero filed a request for mediation in Argentina against

The Argentinean Action

Ziemke Aff. ¶ 12(h), Ex. L.

exchange of correspondence.
correspondence from abroad. We hereby interrupt the circumstances, as you continue sending your relationship, fact that is still evidenced, among other You never had any willingness to resume the employment agreement has been terminated due to your exclusive fault. repeat our telegram dated April 3, 2003. The employer suspended the employment relationship, which were in effect before you voluntarily, terms, which were sent in due course. Our Company has opposite, the Company fully confirmed the economic not changed the economic term as you highlighted; quite the correspondence were sent in due course. Our Company has malicious and irrelevant. All our responses to your dated April 5, 2003. We firmly deny it for being false, Mr. Camero, We acknowledge receipt of your telegram

(h) On April 9, 2003, BSA responded as follows:

Ziemke Aff. ¶ 12(g), Ex. K.

your fault. I reserve rights and actions.
event I considered again offended and ratify dismissal for acknowledgement of change of economic condition in any relationship terminated for your fault. I reject reception of telegram 25/3/03 however untimely. In light of untimely and telegram 175/175 03 1705 for being false and I hereby reject telegram 140/132 12 1325 since it is

³ Argentinean Labor Law requires that these labor certificates be provided to employees who are terminated for any reason whatsoever. Dodds Aff. ¶ 8.

For the convenience of the Court, a portion of the mediator's summary of the mediation has been translated from Spanish to English by an Argentinean attorney.

that Camero had baselessly accused BSA and BSC of accounting irregularities, damaging BSA's and BSC's reputations. BSC and BSA also asked the Argentinean court to accept judicial events leading up to Camero's voluntary resignation from employment with BSA and alleged Argentinean Labor Court. Dodds Aff. ¶ 12, Ex. C. In that Action, BSC and BSA set forth the Argentinean Labor Court. Dodds Aff. ¶ 12, Ex. C. In the spring of 2003, BSC and BSA filed the Argentinean Action with the Argentinean Labor Court, Dodds Aff. ¶ 11, Ex. B.

against him for defamation. Dodds Aff. ¶ 11, Ex. B.

of the labor certificates. BSA and BSC also informed Camero that they intended to file an action refused them. BSA therefore informed Camero that it intended to file a request for consolidation indicated that BSA offered to submit certain labor certificates to Camero but that Camero had settlement regarding their claims and closed the mediation proceedings. The mediator also session, the Argentinean mediator concluded that BSA, BSC and Camero could not reach a unlawful accounting practices and to force him to accept the labor certificates. During that counterclaims against Camero to restrain him from asserting that BSC and BSA had engaged in hearings in Buenos Aires. Dodds Aff. ¶ 11. At that session, BSA and BSC presented

15. On June 12, 2003, BSA, BSC, and Camero participated in a mediation settlement with mediator Daniel Braga Rosado. Dodds Aff. ¶ 9. During that session Camero extended his claims to BSC.

14. On April 28, 2003, Camero, BSA and BSC participated in a mediation session Law 25,561 and its amendments, application of Law 25,323." Dodds Aff. ¶ 6, Ex. A.²

moral damages, moving expenses, air tickets, travel expenses, stock option rights, application of

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policy—whether or not the employee has a written contract of employment. *Id.* The severance cause to be an unjustified breach of the employment contract that runs contrary to public statute only entitled to severance indemnities because Argentina considers a termination without cause is do not. *Id.* More specifically, an employee in Argentina who is terminated without cause is discharged without cause whereas many other countries, including the United States, generally consistent with Argentina's public policy, which provides a remedy to employees who are disputes under an employment agreement that is performed in Argentina. *Id.* at 18. This is 18. Argentine courts have jealously guarded their exclusive jurisdiction to resolve from officers residing in a different country. *Id.*

law applies if services are rendered in Argentina-- even if the employee received instructions application of Argentine law. *Id.* In fact, Argentine courts have consistently held that Argentine Camero rendered occasional services outside of Argentina does not alter the mandatory the place of execution of the agreement and the place of performance differ. *Id.* The fact that applies if the services under an employment relationship were rendered in Argentina, even when Dodds Supplemental Aff. ¶ 16-17. Argentine courts have unanimously held that Section 3 of the country, provided it is performed in the Argentine Republic.

agreement executed within the Argentine territory or in a foreign and the rights and duties of the parties to an employment. This law shall govern all matters or issues involving the validity of, Mr. Camero's claims. Section 3 of the Argentine Employment Contract Law states:

17. According to Argentine statutory law and case law, Argentine law must govern Dodds Aff. ¶ 13, Ex. D.

attempt, the Argentine court successfully served Camero with the Argentinean Complaint. damages in the amount of \$30,000 Argentinean pesos. On August 14, 2002, on its second deposit of the labor certificates that Camero had refused. Dodds Aff. ¶ 12. BSC and BSA sought

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"reasonably believed" BSC's "conduct . . . constitutes a violation of the provisions of Title 18 of when it terminated his employment. Blickenstaff Aff. ¶ 6. Camero's complaint asserts that he Labor ("DOL") alleging that BSC violated Section 806 of the Sarbanes-Oxley Act ("SOX") 23. On July 2, 2003, Camero filed a complaint against BSC with the Department of

The DOL Complaint

7, 2004. This Court's decision with respect to that motion is pending. thoroughly briefed the relevant legal and factual issues and engaged in oral argument on January Action pending the outcome of the Argentinean Action. Blickenstaff Aff. ¶ 2. The parties 22. On September 15, 2003, BSC filed a Motion to Dismiss or Stay the Massachusetts transactions or occurrences on which the Argentinean Action is based.

21. In the Massachusetts Action, Camero raised claims that arise out of the same on August 25, 2003.

Argentinean Action, Camero filed the Massachusetts Action on August 7, 2003 and served BSC 20. After commencing mediation in Argentina and after BSC and BSA filed the appropriate forum for the parties' litigation. Dodds Aff. ¶ 15.

defame BSC and BSA by reporting accounting irregularities; and (4) that this Court is the more BSA and its other subsidiaries and is therefore liable for BSA's actions; (3) that he did not other things, that (a) he was employed by BSC, not exclusively by BSA; (2) that BSC controls (the "Argentinean Answer"). Dodds Aff. ¶ 15, Ex. F. In that Answer, Camero claims, among 19. On September 2, 2003, Camero filed an answer to the Argentinean Complaint

deter employees from terminating employees without cause. Id. indemnities are intended to remedy the employee's economic and moral damage, but also to

protect investors and the market.” Blickensstaff Aff. ¶ 8.

protecting any employee of a publicly traded company who took such reasonable action to try to specifically, Senator Leahy stated that SOX “was intentionally written to sweep broadly, Senator Leahy was evidence of Congressional intent to apply Section 806 extraterritorially. Senator Leahy was evidence of Congressional intent to apply Section 806 extraterritorially, novo review of the DOL’s ruling. In a cover letter to the Court, he asserted that a comment by 25. On January 7, 2003, Camero filed his DOL complaint with this Court seeking de

The DOL supplied a copy of this ruling to the Securities and Exchange Commission.

See Blickensstaff Aff. ¶ 7.

[Camero] allegation of retaliatory discharge under [Section 806].
 [The DOL], therefore, does not have jurisdiction to investigation subcontractors during their employment outside the United States.
 employees of covered companies or their contractors or intended the anti-retaliation provision in Title VII to extend to nothing in the language of [Section 806] indicates that Congress

preliminary ruling on December 19, 2003 that:

Office to the Secretary of Labor and to the Solicitor’s Office before the DOL issued its BSC’s understanding that the extraterritoriality issue was referred by the DOL’s Regional jurisdiction. Based on statements made by Mr. Camero’s counsel and by DOL representatives, it statement to the DOL on July 7, 2003 regarding the jurisdictional issue. The DOL did not notify BSC of Mr. Camero’s claim nor did it ask BSC to state a position regarding the DOL’s made aware that the DOL questioned its jurisdiction. Mr. Camero’s counsel submitted a allegations. Shortly after he filed Camero’s complaint with the DOL, Mr. Camero’s counsel was 24. BSC was not served with Camero’s DOL complaint or asked to respond to his US federal law relating to fraud against shareholders.” Id.

the United States Code, rules or regulations of the Securities Exchange Commission and other

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January 27, 2004

~~ATTORNEYS AT LAW~~

[Signature]
 This copy of the above document
 was served upon the attorney of record for each
 other party by *[Signature]* on 1/23/04.

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By its attorneys,

BOSTON SCIENTIFIC CORPORATION

Respectfully submitted,

in the alternative, its Motion for Summary Judgment or to Stay.

BSC respectfully requests oral argument on the issues raised by its Motion to Dismiss, or

REQUEST FOR ORAL ARGUMENT

Jurisdiction is an issue for the District Court to determine. Blickenstaff Aff ¶10.

January 26, 2004, the ALJ indicated that the issue of whether the DOL has any further

DOL complaint based upon his filing of this action. During a teleconference with the ALJ on

27. On January 22, 2004, the Administrative Law Judge ("ALJ") dismissed Camero's

Jurisdiction to investigate Camero's complaint. Blickenstaff Aff ¶9.

Legal, but not the factual basis, for the DOL's preliminary finding that it does not have

Hearing on the Record" ("Notice and Objections"). The Notice of Objections challenged the

Review and, Alternatively, Notice of Objections To Preliminary Findings and Request For

26. On January 16, 2004, Camero filed a "Notice of Filing of Action for De Novo